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No. 97-1897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VISTA PAINT CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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The Government attempts to persuade this Court, as it persuaded the Ninth Circuit, that this case is nothing more than a routine administrative dispute unworthy of attention. But it is precisely this cavalier approach toward the imposition of staggering civil fines that warrants this Court's review. Each of the three questions presented relates to the integrity of the judicial process afforded to petitioner. Each of those three questions, in addition, was incorrectly decided below, and conflicts with other rulings. Accordingly, this Court should grant review.

1. Preclusion of Judicial Review

The Government first attempts to defend the Ninth Circuit's ruling precluding Vista from challenging the validity of the very regulations being enforced in this proceeding. *See* Opp. Br. 10-16. The Government, like the Ninth Circuit, relies on Section 307(b)(2) of the Clean Air Act, which precludes judicial review at the enforcement stage of any action "with respect to which review could have been obtained" when the regulation was first adopted. 42 U.S.C. § 7607(b)(2). Such reliance is wholly misplaced.

Analysis of this issue must start from the premise that it is an extraordinary step for Congress to deny a defendant an opportunity to challenge the validity of a regulation being enforced against him. This Court has upheld such a drastic restriction only once, in *Yakus v. United States*, 321 U.S. 414 (1944). That case, however, arose in the unique context of a wartime challenge to an emergency price control regulation. Even assuming that *Yakus* was correctly decided, it cannot reasonably be construed as an all-purpose seal of approval for provisions that preclude defendants from challenging the validity of regulations at the enforcement stage. To the contrary, courts must construe such preclusion provisions narrowly, and resolve any doubts against preclusion. *See, e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282-85 (1978); *id.* at 289-91 (Powell, J., concurring); *cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991).

The Ninth Circuit displayed no such restraint, and instead broadly held that Section 307(b)(2) precluded all of Vista's challenges to the validity of the SIP. *See* Pet. App. 36a. Vista had "ample opportunity," the Ninth Circuit declared, to challenge the SIP at the time it was initially adopted by the EPA. *Id.* That holding is manifestly incorrect.

For the past quarter century, it has been settled that the EPA cannot consider challenges based on economic and/or technological infeasibility in deciding whether to adopt a SIP. *See Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976). It necessarily follows that such challenges (1) cannot be raised in a proceeding for direct review of such a decision, and thus (2) are not precluded in any subsequent enforcement proceeding. *See, e.g., Indiana & Mich. Elec. Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 172-73 (6th Cir. 1973). This Court noted, but did not expressly decide, this point in *Union Electric*. *See* 427 U.S. at 268 n.18.

The Ninth Circuit thus erred, and brought itself into conflict with these other circuits, by holding without qualification that all of Vista's challenges to the SIP were precluded because the were not raised in a pre-enforcement proceeding. *See* Pet. App. 36a. The Ninth Circuit drew no distinction between challenges based on economic and/or technological feasibility and other challenges. The Government now attempts to defend that holding on the ground that none of Vista's challenges to the SIP involved issues of economic and/or technological infeasibility. *See* Opp. Br. 10-12. That is simply not so.

From the beginning of this litigation, Vista challenged the validity of the SIP on numerous grounds, including several relating to economic and/or technological feasibility issues outside the EPA's statutory ken. It is important to note, in this regard, that "economic and technological infeasibility" is not a term of art, but rather a phrase used by this Court in *Union Electric* to describe considerations that the EPA is not authorized to consider in evaluating a SIP. *See* 427 U.S. at 256. These considerations encompass (1) the economic costs

imposed on one or more affected entities, or (2) the technological adjustments that would have to be made to conform to the prescribed environmental norms. *See, e.g., Buckeye Power,* 481 F.2d at 167.

It is abundantly clear that several of Vista's challenges to the California SIP fell into one or both of these categories, and hence should not have been precluded in this enforcement proceeding. Indeed, the Government's own recitation of Vista's challenges includes at least two that on their face involved economic or technological feasibility. *See* Opp. Br. 11 n.6.

First, Vista challenged the SIP on the ground that the local pollution-control agencies had failed to "'assess and duly consider the economic impacts [of the VOC limits], as required by law.'" Opp. Br. 11 n.6 (quoting Pet. C.A. Br. 29, *United States v. Vista Paint Corp.*, No. 92-55160 (9th Cir.)). In support of that challenge, Vista specifically relied on *Western Oil & Gas Ass'n v. Air Resources Bd.*, 691 P.2d 606, 608 (Cal. 1984), the very case on which it now relies for the proposition that "a local air quality district must assess and duly consider the economic impact of its standards." Pet. 9.

Second, Vista challenged the SIP on the ground that the local pollution-control agencies had engaged in improper "crystal-ball gazing" by setting standards that were infeasible in light of the current state of technology. Opp. Br. 11 n.6 (quoting Pet. C.A. Br. 29-30, *United States v. Vista Paint Corp.*, No. 92-55160 (9th Cir.) (in turn citing *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973)). Despite these two economic and technological feasibility defenses, the Ninth Circuit broadly held that Vista was precluded from challenging enforcement of the SIP by its previous failure to challenge adoption of the SIP. *See* Pet. App. 36a.

Vista challenged that holding in an interlocutory petition for *certiorari*. *See* Pet. for a Writ of Cert., *Vista Paint Corp. v. United States*, No. 92-2026 (filed 6/21/93). The Government filed an opposition to that petition arguing solely that the

petition was untimely on the theory that Vista's petition for rehearing in the Ninth Circuit had been untimely. *See* Mem. in Opp., *Vista Paint Corp. v. United States*, No. 92-2026 (filed 8/5/93). Vista addressed that argument in its reply brief. *See* Reply Brief, *Vista Paint Corp. v. United States*, No. 92-2026 (filed 8/13/93). Over one month later, the Government filed a "Supplemental Brief" acknowledging the possibility that Vista's petition had been timely filed and for the first time addressing Vista's arguments on the merits. This Court denied the petition shortly thereafter. *See* 510 U.S. 826 (1993). The Government, in other words, sandbagged Vista by getting in the last word. It is disingenuous, to say the least, for the Government now to chide Vista for "not tak[ing] issue at that time with the government's characterization of its invalidity defenses as not being based on technological or economic feasibility," Opp. Br. 12—a characterization made for the first and only time in a belated supplemental brief to which Vista had no opportunity to respond.

The Government also suggests in the alternative that Vista could have raised a pre-enforcement challenge to the SIP based on economic or technological infeasibility by labeling it a challenge to the validity of the SIP under state law. *See* Opp. Br. 15 (citing 42 U.S.C. § 7410(a)(2)(E)). Such semantic sleight-of-hand, however, is untenable. Any challenge based on economic or technological infeasibility must ultimately be rooted in law—neither the EPA nor the courts can adjudicate a challenge based on free-floating considerations of economic or technological feasibility without some legal basis. This Court's holding in *Union Electric* that the EPA is not allowed to consider challenges based on economic or technological infeasibility would be entirely meaningless if such challenges could be presented under the guise of challenges to the validity of a SIP under state law. As the Seventh Circuit has explained, "a plan's technological feasibility and economic impact are not among the factors which the Administrator is obliged to consider under [42 U.S.C. § 7410(a)(2)], and . . . where a state's implementation plan satisfies the criteria set forth

therein, the statute quite specifically requires the Administrator to approve it." *Indiana & Mich. Elec. Co.*, 509 F.2d at 844. Because the EPA cannot consider a pre-enforcement challenge to a SIP based on economic or technological infeasibility, Vista should not be precluded from raising such a challenge now. The Government's argument to the contrary boils down to nothing more than "heads I win, tails you lose."

The Government finally attempts to downplay the effect of precluding Vista's validity defenses by arguing that Vista was "free to raise such issues during the penalty phase of the case in an effort to show 'good faith efforts to comply' with the VOC limits." Opp. Br. 16 (quoting 42 U.S.C. § 7413(e)(1)). That argument is meritless. It is wholly foreign to our system of justice to suggest that a defendant can be precluded from raising a defense to the imposition of liability if he is subsequently allowed to raise that defense to limit the penalty. It goes without saying that an individual or entity can suffer significant collateral injury from a finding of liability even if no penalty at all is imposed. Thus, even assuming that Vista's challenges to the SIP based on economic and/or technological infeasibility were coextensive with the company's "good faith efforts to comply" with the SIP—which is by no means clear—that point would in no way justify the preclusion of Vista's challenges to the validity of the SIP at the liability stage. Vista was forced to defend itself in this proceeding with its hands tied behind its back. The Clean Air Act does not require, and the Constitution does not tolerate, any such result.

2. Improper Burden of Proof

The Government next attempts to defend the ruling below that there is no burden of proof in a proceeding to determine the amount of a statutory penalty under the Clean Air Act. *See* Opp. Br. 16-20. That ruling, however, makes no sense, as there is *always* a burden of proof in any proceeding (like a penalty proceeding under Section 113(e)(1) of the Clean Air Act) that requires a court to determine certain facts. In addition, the

ruling below only exacerbates the prevailing confusion among the lower federal courts on this important issue.

The notion, embraced by the courts below and now the Government, that there is no burden of proof in a Clean Air Act penalty proceeding is manifestly erroneous. The whole point of such a proceeding, and the whole reason that the Ninth Circuit reversed the District Court's grant of summary judgment in the first round of this litigation, *see* Pet. App. 38a-39a, is for the court to make factual findings as a predicate for application of the statutory penalty factors. The fact-finding process necessarily calls for a burden of proof: either the Government or the defendant must bear the burden of proving that certain facts more likely than not are true. The court's subsequent obligation to weigh all those facts and balance the various statutory penalty factors in no way negates the existence of this threshold burden of proof.

There is, moreover, no reason to think that the Clean Air Act represents a departure from the bedrock norm in our legal system that the burden of proof in civil cases rests squarely upon the plaintiff—here, the Government. *See, e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12 (1993); *Addington v. Texas*, 441 U.S. 418, 428 (1979). Accordingly, where (as here) the Government seeks to exact a penalty for a violation of the Act, it bears the burden of proving that the penalty is justified. The defendant does not bear the burden of proving that the penalty is not justified. *See, e.g., United States v. Midwest Suspension & Brake*, 824 F. Supp. 713, 735 n. 30 (E.D. Mich. 1993), *aff'd*, 49 F.3d 1197 (6th Cir. 1995); *Student Public Interest Research Group v. Monsanto Co.*, 18 Envtl. L. Rep. 20,999, 1988 WL 156691, at *12-*16 (D.N.J. 1988).

The Government attempts to sidestep this division of authority by asserting that any error in the allocation of the burden of proof in this case was harmless. *See* Opp. Br. 20. That assertion is misguided as a matter of law and fact. As an initial matter, it is settled that a misallocation of the burden of proof is a structural error that infects an entire trial and

accordingly is not susceptible to harmless-error review. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 279-82 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991). In any event, it is simply not true that "the district court would have reached the same conclusion" regardless of the burden of proof. Opp. Br. 20. As Vista detailed in its briefs below, the misallocation of the burden of proof may well have tipped the scales on several critical issues, including (1) financial impact of the fine, (2) good-faith efforts to comply, and (3) financial benefit from non-compliance. The Government's unvarnished (and counterintuitive) speculation that the burden of proof did not affect the penalty imposed is baseless and unwarranted.

3. Trial by Affidavit

The Government finally attempts to defend the District Court's decision to dispense with oral testimony and instead conduct a summary "trial by affidavit" with respect to the penalty factors under the Clean Air Act. *See* Opp. Br. 20-23. Contrary to the Government's characterization, however, Vista does not contend that the District Court simply "abused its discretion" in its conduct of the penalty trial. *Id.* at 20. Rather, Vista contends that the District Court violated the straightforward command of Rule 43(a) of the Federal Rules of Civil Procedure that "in all trials" the testimony of witnesses shall be taken "in open court." A district court simply has no "discretion" to disregard that mandate by compelling litigants to present their direct evidence by affidavits. *See, e.g., Murphy v. Tivoli Enters.*, 953 F.2d 354, 359 (8th Cir. 1992) ("Rule 43(a) presupposes that a witness will be physically present in the courtroom to give testimony orally.").

The Government attempts to defend the decision below on the ground that Rule 43(a) is trumped by Rule 611(a) of the Federal Rules of Evidence, which authorizes district courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." That attempt is unavailing. "It is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World*

Airlines, Inc., 504 U.S. 374, 384-85 (1992), and the general provisions of Rule 611(a) in no way purport to override the specific command of Rule 43(a). The Government's approach, which would create a conflict between these two rules and render Rule 43(a) a dead letter, is simply untenable.

In addition, the Government fails to explain away the conflict between the decision below (which reflects settled Ninth Circuit law, *see, e.g., In re Adair*, 965 F.2d 777, 779-80 (9th Cir. 1992) (*per curiam*); *Phonetele, Inc. v. AT&T*, 889 F.2d 224, 232 (9th Cir. 1989), *cert. denied*, 503 U.S. 914 (1992)) and decisions from other circuits construing Rule 43(a). In particular, the Government fails to distinguish a line of cases holding that Rule 43(a) prohibits trial courts from conducting trials by affidavit. *See* Pet. 19-20 (citing, *inter alia*, *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 313 (7th Cir. 1986) (Easterbrook, J.), and *Lebeck v. William A. Jarvis, Inc.*, 250 F.2d 285, 294-95 (3d Cir. 1957)). The Government contends that *Walton* is distinguishable because the Seventh Circuit there concluded that the Rule 43(a) error was harmless. *See* Opp. Br. 23. But that contention misses the point: *Walton* set forth a rule of law diametrically opposed to the rule of law set forth below, and whether the particular error at issue in *Walton* was prejudicial is immaterial. The Government's further observation that *Walton* "did not consider the relationship between Rule 43(a) . . . and Rule 611(a)," Opp. Br. 23, only underscores the sheer implausibility of construing the one rule to override the other. Similarly, the Government cannot reasonably distinguish *Lebeck* on the ground that the case involved a jury, rather than a bench, trial, because Rule 43(a) draws no such distinction.

In the final analysis, this is the kind of elementary procedural issue about which there should be no confusion in the bench and bar. In this era of increasingly crowded dockets, it is undoubtedly tempting for busy trial courts to require litigants to present their case by simultaneous affidavits. *See, e.g.*, Hon. Charles Richey, *A Modern Management Technique*

for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial, 72 Geo. L.J. 73, 73-74 (1983) (advocating use of this device). But this understandable desire for judicial efficiency cannot be allowed to supplant the traditional right to present live witness testimony, a hallmark of Anglo-American justice. At the very least, this should not be an issue on which the law is unclear. Accordingly, this Court should grant review to clarify whether Rule 43(a) still means what it says.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of *certiorari*, this Court should grant the petition.

Respectfully submitted,

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